

### ***Remarks***

Applicant hereby offers the following remarks.

Claims 5-10, 12-15, 17, and 18 are under consideration, with claims 5, 8 and 14 being independent claims. Claims 1-4 were originally filed. Claims 5-10 were added in the amendment filed February 8, 2004, claims 11-13 were added in the amendment filed July 19, 2004 and claims 14-18 were added in the amendment filed June 29, 2005. Claim 4 was cancelled in the amendment filed February 8, 2004, claims 1-3 and 11 were cancelled in the amendment filed June 29, 2005 *and claim 16 cancelled in the amendment filed on June 16, 2006.*

Applicant repeats the notation that the cited reference, Bledstein (U.S. Patent No. 5,701,892) has never been listed on a PTO 892 form and was not provided to the applicant. Applicant repeats the request that the references be properly cited so that the cited references are listed properly in the application.

Based on the following remarks, Applicant respectfully requests that the Examiner reconsider all outstanding objections and rejections and that they be withdrawn.

### ***Objection to Drawings***

It is assumed by the Applicant that the objection to the drawings under 37 C.F.R. 1.83(a), set forth by the Examiner in the Action mailed March 16, 2006 has been withdrawn, as the objection was not included in the Action mailed January 22, 2007.

### ***Rejection of Claims under 35 U.S.C. 112, First Paragraph***

It is assumed by the Applicant that the rejection of claim 16 under 35 U.S.C. § 112, first paragraph as set forth by the Examiner in the Action mailed March 16, 2006 has been withdrawn, as the rejection was not included in the Action mailed January 22, 2007.

Claim 16 was cancelled in the Reply filed June 16, 2006, without agreeing to the assertions of the examiner, thus rendering the rejection moot.

***Rejection of Claims under 35 U.S.C. 103(a)***

The Examiner has maintained the rejection of claims 5-10, 12, and 13 and 14 under 35 U.S.C. §103(a) as being unpatentable over Hudson (U.S. Patent No. 2,843,121) in view of Bledstein (U.S. Patent No. 5,701,892).

The Examiner restated his arguments regarding claims 5, 7, 8 and 10. The Examiner found all of the arguments set forth by the Applicant as not persuasive and further stated without further elaboration that “the combination of Hudson and Bledstein teaches both ends of each pair of bands are affixed at points of attachment.” (page 2, paragraph 2)

The Examiner refers to Figures 1, 2 and 4-6 of the ‘892 Bledstein patent showing 4 points of attachment and ear loops and combined with the ‘121 patent (Hudson) and alleges that the combination “teaches that the bans are adjustably securable to the patient by pulling the ends anteriorally through the points of attachment,” and concludes that “[o]bviously, there would be more points of attachment with the same adjustable configuration of Hudson to accommodate the ends of the bands taught by Bledstein.”

The Examiner also states that the motivation to combine the two references is provided in col. 6, lines 15-16 of the ‘121 patent, namely, not messing the hair of the user.

The Applicant respectfully disagree. The Examiner continues to fail to address the additional limitations of claim 5, 7, 8 and 10: 1) a *pair* of elastic bands, 2) *both ends of each pair* affixed at points of attachment to each of both sides of said oxygen mask, said bands extendible to loop over and around each ear of the patient and 3) adjustably securable to said patient by pulling the ends anteriorally through said points of attachment. Hudson only has *one pair* of

elastic bands and does not disclose a pair of elastic bands on each side, as required by the claims. Also, Applicants note that col. 2, lines 36-38 states that the comfortable wearing position is “just below the ears,” which teaches away from the invention, which requires that the bands extend to loop over and around each ear of the patient, as included in independent claims 5, 8 and 14. Additionally, the ‘121 patent teaches away from the invention in col. 2, lines 30-32, wherein the strap of the mask “can readily be moved only by pinching the strap together adjacent the opening, forcing it into a relatively rounded shape and then pulling it.” This type of strap adjustment, also exemplified in Figure 6, is a strap that is folded through the opening with the construction such that the strap is not readily moved, particularly with one hand; the act of rounding the strap to force it through a round hole then pulling the strap would require the use of two hands, and unnecessary movement of the patient, particularly in emergency response services wherein patients may have neck and spinal injuries and one hand of the attendant is often occupied in other tasks (see page 2, lines 5-16 of the specification). The strap of the ‘121 patent are not moved by simply pulling anteriorly on the strap, as claimed herein, but by pinching the straps to make them round, then pulling on them, especially as claim 3 of the ‘121 patent requires a flat strap and a round hole (see Figures 4 and 6).

Although the Examiner continues to assert, take official notice and make unsupported statements that the claimed invention is obvious, there has been a long-felt need in the emergency services for a mask that can easily be placed without undue movement of the victim. Applicant provides Declarations by **Jonathan Van Zile, MD**, an Emergency Department Physician, Disaster team director, and EMS Medical Director for the Hamilton County-wide (police and EMS) Communications Center (an integrated county-wide 911 center), Medical Director for the Amusement park, Kings Island (sister park to “Kings Dominion”) and Medical

Director for three (3) City Ambulance services (known in Ohio as “Life Squads”) (20 years experience); **Judy Levy, RN, BSN**, an Emergency Department nurse and EMS Coordinator and Paramedic Training Director and Supervisor (33 years experience); **Kathleen Ballman, RN, BSN, MSN**, a Registered Nurse Practitioner, an Emergency Department nurse providing direct respiratory care and Heart Failure Specialist (30 years experience); **Raymond P. Mueller, Jr., RN, Paramedic**, who works in cardiac intensive care (18 years experience as an RN, 27 years experience as a Paramedic); and **Sandra Wolf Tomlin**, a Registered Respiratory Therapist (30 years experience). These persons of ordinary skill in the art at all levels of emergency and critical care, with a combination of 140 years of experience, have declared that the mask of the invention is both needed in the field and not currently provided in the market. All of them are aware of the state of the art and the various masks and attachments on the market and state the need of the claimed invention in the market and the absence of the claimed invention in the market. If these persons of ordinary skill in the art are aware of the current art and find the invention to be new and unobvious, then Examiner’s assertions that “it is well know [sic] in the art of masks that the use of a pair of bands in an alternative for one band” is not properly applied and the rejection must be withdrawn.

The Applicant restates the position that it appears that the examiner is merely lumping many different aspects of several patents together and uses the Applicant’s own disclosure to guide him in reconstructing the applicant’s invention. Applicants continue to assert that *the Examiner continues to apply impermissible hindsight reconstruction to arrive at the Applicant’s invention.*

Regarding the dependent claims, as the Examiner has not established a *prima facie* case of obviousness in the independent claims 5, 8 and 14, the Examiner's comments regarding the dependent claims cannot stand.

The Examiner maintained his rejection of claims 5-10 and 12-14 under 35 U.S.C. 103(a) as "being unpatentable over Hudson in view of Bledstein.

Applicant restates the remarks made in the Reply filed June 16, 2006. In addition, the Examiner states that "[a]s long as at least one end of the ear loop goes through the adjustable attachment, the strap would still be adjustable. However, the claim language is that all bands are adjustable. This is of practical necessity to ensure an adequate fit of the mask in a moving environment such as an ambulance or moving a patient within a hospital setting.

#### ***Rejection of Claim 16:***

The Applicant also assumes that the rejection regarding claim 16 on page 8 of the Action was in error, as the Applicant cancelled claim 16 in the June 16, 2006 Reply.

Therefore, the Applicant asserts that in all outstanding obviousness rejections, that the Examiner has failed to set forth a proper *prima facie* case of obviousness based upon the failure to address all the limitations of the claims and the Applicants assert that the Examiner has used forbidden hindsight reconstruction to craft the rejections.

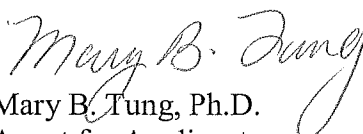
### *Conclusion*

Claims 5-10, 12-15, 17 and 18 are under consideration by the Examiner. The Applicant respectfully requests consideration of the application in view of the Remarks and Declarations submitted herewith. The applicant requests that the Declarations be entered in the present application as the Declarations present convincing evidence that the claims are patentable over the references cited by the Examiner; that the Declarations place the application in better condition for allowance and/or appeal; and that the Declarations do not raise new issues or introduce new matter.

In view of the above remarks, Applicant respectfully submits that the application and claims are in condition for allowance, and request that the Examiner reconsider and withdraw the objections and rejections. Applicant believes that a full and complete reply has been made to the outstanding Office action and, as such, the present application is in condition for allowance. If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at the number provided.

Prompt and favorable consideration of this Reply is respectfully requested.

Respectfully submitted,

  
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